No. 1042 (22)

Office - Supreme Court,
FILED
MAY 22 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

ALFRED S. DAVIS, as Treasurer of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "JOHN DOE" and "RICHARD ROE", members of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown,

Petitioners,

against

DINNY & ROBBINS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

SIMON J. LIEBOWITZ,
Attorney for Petitioners,
270 Broadway,
New York City.

On the Brief,

SIMON J. LIEBOWITZ
and
LEON REICH.

Dated, New York, May 20, 1943.

APPEAL PRINTING CO., INC., 129 CEDAR ST., NEW YORK, WO 2-3242

INDEX

	PAGE
PETITION	1
I. Summary Statement of Issues Involved	2
A. The Facts Out of Which the Action Arose	2
B. The Nature of the Action	4
II. Jurisdiction of This Court	10
The Judgment Here in Question Is a Final Judgment Rendered After Trial of the Action, Absolutely and Permanently Enjoining the Peaceful and Orderly Labor Activities of the Petitioner Union	10
III. Questions Presented	11
IV. Reasons for Allowance of Writ	12
National Importance of the Issues in Question	14
BRIEF	19
I. Opinions of Courts Below	19
II. Jurisdiction	20
Date of Entry of Judgment to Be Reviewed	20
III. Statement of the Case	20
IV. Specification of Errors to Be Urged	20
V. Summary of Argument	21
(A) The Injunction Issued by the State Court Violated the Constitutional Guarantee of Freedom of Speech and Assembly	21

PAGE

(B) There Was No Local Question Involved Which Furnished the Basis for Deciding This Case Without Reference to the Federal Question 21

VI. Argument 21

(A.) The Injunction Issued by the State Court Violated the Constitutional Guarantee of Freedom of Speech and Assembly 22

1. The activities in question consisted solely of peaceful and orderly dissemination of opinion of the petitioner union 22

2. The Constitutional Guarantee Here Invoked 24

3. The Decision of the New York State Court of Appeals Is Inconsistent with the Decisions of This Court 25

4. The Judgment of the State Court Inaugurates Judicial Censorship of Speech in Labor Controversies 29

(B.) There Was No Local Question Involved Which Furnishes a Basis for Deciding This Case Without Reference to the Federal Question 30

Conclusion 31

Table of Cases Cited

PAGE

A. F. of L. *v.* Swing, 312 U. S. 321 ..... 13, 14, 26, 28
Angelos *v.* Mesevich, 289 N. Y. 498 7–8

Bakery and Pastry Drivers Union *v.* Wohl, 315 U. S. 769 ..... 10, 13, 27

Cantwell *v.* Connecticut, 310 U. S. 296 27
Carlson *v.* California, 310 U. S. 106 ..... 13, 27

Edjomac *v.* Empire, 273 N. Y. 647 15

Interborough R. T. Co. *v.* Lavin, 247 N. Y. 65 9

J. H. & S. Theatres, Inc. *v.* Fay, 260 N. Y. 315 9
Journeymen Tailors Union Local # 195 *v.* Miller's, Inc., 61 S. Ct. 732 ..... 13, 25, 28

Largent *v.* State of Texas (559—October Term, 1942) 14, 27

Milkwagon Drivers Union *v.* Meadowmoor, 312 U. S. 287 27

Nann *v.* Raimist, 255 N. Y. 307, 319 10

Schneider *v.* State, 308 U. S. 147 ..... 13, 27
Senn *v.* Tile Layers Union, 301 U. S. 468 13
Stillwell Theatre, Inc. *v.* Kaplan, 259 N. Y. 405 9

Thornhill *v.* Alabama, 310 U. S. 88 ..... 13, 14, 26, 27

United States *v.* Building and Construction Trades Council of New Orleans, Louisiana, 61 S. Ct. 839 13
United States *v.* Hutcheson, 312 U. S. 219, 61 S. Ct. 463 ..... 12, 25, 28
United States *v.* The United Brotherhood of Carpenters and Joiners of America, 61 S. Ct. 839 13

Statutes Cited

Civil Practice Act of the State of New York, Section 876-A 7, 13

U. S. Constitution, Amendment XIV, Section 1 12

U. S. Judicial Code:
Section 237-b (28 U.S.C.; Section 344-b) 11, 20
Section 243 (28 U.S.C.; Section 350) 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

ALFRED S. DAVIS, as Treasurer of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "JOHN DOE" and "RICHARD ROE", members of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown,

Petitioners,

against

DINNY & ROBBINS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Alfred S. Davis, as Treasurer of Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "John Doe" and "Richard Roe", members of Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown, and the petition of each of them, respectfully shows to this Honorable Court:

I. Summary Statement of Issues Involved

A. The Facts Out of Which the Action Arose:

This case arises out of industrial dispute in the retail shoe industry in the City of New York, which originated prior to our entry into war.

The disputants involved are the petitioner union and the respondent herein which is engaged in selling shoes at retail.

The Trial Court found that the respondent was engaged in the retail shoe business operating three stores, one of which was located at 484 Seventh Avenue, in the City of New York; that the petitioner union is a trade union engaged in the organization and representation of all employees of the retail shoe business (53-54). The Trial Court also found that on December 2, 1941, the Union sent to the respondent a letter, by registered mail, enclosing a copy of a contract for the respondent's approval and requesting that the respondent advise the Union, within three days, whether it found the same acceptable. Respondent paid no attention to said letter or contract, and never answered the same or communicated with the Union in any manner (58-60). Approximately three weeks thereafter, the Union, having failed to hear from the respondent, caused one person to picket peacefully on January 12th, 1942, in front of one of the respondent's stores, located at 484 Seventh Avenue, City of New York. Said picket bore a placard which read as follows:

"Dinny & Robbins Shoes

are

Unfair to

Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., American Federation of Labor." (54)

Said picketing continued thereafter and the picketing was not accompanied by any disturbance or violence (55-56); that the picketing was at all times peaceful and not disorderly. Said picket made no verbal statements and the only information conveyed to the public was the information carried on the placard (56). The Union at no time stated that any of the respondent's employees were on strike (57). At the time the picketing commenced the respondent was and had been under contractual relationship with a C.I.O. Union, known as Retail Shoe Salesmen's Union of New York, Local 1268, affiliated with Congress of Industrial Organization, and pursuant to such relationship had employed and was employing shoe salesmen who were members of said C.I.O. Union (57-58).

The Trial Court further found:

> "The defendant acted as it did for the purpose of benefiting its members and itself." (60)

Despite the fact that the picketing was unaccompanied by any verbal statements and the picket merely carried an "unfair" sign, which specifically advised the public that it was the opinion of the Union that the respondent was unfair to it, the Trial Court found

> "That the picketing was misleading to the general public and the customers of the plaintiff, in that they were led to believe that the employees of the plaintiff were on strike, and that the plaintiff was unfair to organized labor." (74)

In the conclusions of law, on the basis of the above, the Trial Court found that

> "Said picketing by the defendant was improper and unlawful, as libelous and misleading." (74)

A broad and absolute permanent injunction was granted, the contents of which are more fully discussed in a subsequent paragraph.

B. The Nature of the Action:

The present action was commenced by the respondent for the purpose of obtaining injunctive relief against the above mentioned activities of the petitioner union.

After finding the aforesaid facts, the Trial Court rendered judgment in favor of the respondent absolutely enjoining the picketing in question.

In the conclusions of law found by the Trial Court, the plaintiff-respondent was entitled to a permanent injunction, enjoining, restraining and prohibiting the Union

> "from in any manner interfering with the conduct of the business of any store operated by the plaintiff, directly or indirectly, by *placard* or *sign* or *by word of mouth,* or by force *or otherwise,*"

except picketing of a certain kind, herein discussed (78).

The judgment enjoined and restrained the Union

> (1) "from authorizing, permitting and joining in the use of * * * *persuasion* against the customers of the plaintiff herein or other persons having business relations with the plaintiff, and who may intend or desire to become or have such relations or who consider becoming such customers or having such relations, and from using any and all persons, means and methods of doing any of the aforesaid forbidden acts, either directly or indirectly". (84-85)
>
> (2) "* * * except that the defendant be permitted to have one man walk in front of plaintiff's store at 484 Seventh Avenue, in the Borough of

Manhattan, City and State of New York, carrying a sign to read as follows:

> 'THIS IS NO STRIKE. ALL EMPLOYEES OF DINNY & ROBBINS, INC. ARE REGULAR MEMBERS OF LOCAL 1268, C.I.O., NOT MEMBERS OF LOCAL 1115-F, R.C.I.P.A., A. F. of L.'

and that all letters on the sign be of uniform size and type; * * *" (86)

(3) "From trespassing or entering upon the premises." (83)

(4) "From threatening, intimidating and turning aside against their will those who could or would go to and from the place of business of the plaintiff herein." (83)

(5) "From intimidating or annoying the employees of the plaintiff." (83)

(6) "From otherwise resorting to force, threats or intimidation to compel said employees to leave the employ of said plaintiff, and otherwise disturbing the working organization of the plaintiff." (83)

(7) "From threatening, intimidating or otherwise compelling or seeking to compel, by force, threat or intimidation, the plaintiff herein to liquidate or close its place of business." (84)

(8) "From wilfully and maliciously committing any other acts for the purpose of preventing the plaintiff herein from engaging in business; * * * and from hampering, hindering or harassing in any way the free dispatch of the business of the plaintiff herein." (84)

Thus, it is apparent that the trial court granted a permanent injunction which was broad and absolute and

restrained the Union for all times from exercising peaceful "persuasion", against the customers of respondent or any other persons having business relationship or intending or desiring to have business relationships with the respondent. The injunction prohibited all "persuasion" of any kind, in any form; *whether it be by placard, picketing, word of mouth, advertisements, hand bills, etc.*, except that only one of the respondent's three stores could be picketed, and such picket must carry a sign which must read as follows:

> "THIS IS NO STRIKE. ALL EMPLOYEES OF DINNY & ROBBINS, INC. ARE REGULAR MEMBERS OF LOCAL 1268, C.I.O., NOT MEMBERS OF LOCAL 1115-F, R.C.I.P.A., A. F. OF L."

The effect of this very limited right to picket was to deprive the Union of all right to picket peacefully the stores of the appellant and to disseminate information or opinions to the public which it deems relevant to the issues involved in the dispute. The injunction permitted no other language to be used other than that directed by the trial court. The injunction prohibited all peaceful persuasion, the use of any verbiage or statements except that the picket could advertise, for the benefit of a rival Union, the employer's side of the controversy, and the Union was prohibited from advising the public of its version thereof.

The petitioner appealed to the Appellate Division of the Supreme Court, State of New York, First Department. The respondent also appealed from that portion of the judgment which permitted picketing only with a sign containing the precise censored language prescribed by the Trial Court (7-17). The Appellate Division, by a divided Court of three to two, reversed the judgment of

the Trial Court and the complaint was dismissed upon the ground that the complaint alleged and the evidence established the existence of a labor dispute within the meaning of Section 876-A of the Civil Practice Act of the State of New York (254).

The findings of the Trial Court were adopted by the Appellate Division, except that the finding by the Trial Court that the picketing was misleading or libelous and unlawful, was changed by the Appellate Division to read that the person who picketed did not utter or make any libelous or slanderous statements (228). The Trial Court's conclusions of law were disregarded by the Appellate Division and new conclusions of law were made to the effect that the action involved a labor dispute within the meaning of Section 876-a of the Civil Practice Act (246-247).

The respondent appealed to the Court of Appeals which reversed the determination by the Appellate Division and reinstated the judgment of the Trial Court. Three judges dissented, among them was Chief Judge Lehman. The judgment of the Court of Appeals was entered on March 29th, 1943. The majority opinion, in addition to holding that no labor dispute existed within the meaning of Section 876-a of the Civil Practice Act, held that the injunction did not restrain picketing provided there was a modification of the sign which the picket carried, stating that picketing with a sign containing the language prescribed by the Trial Court, was not prohibited by the judgment. It denied to the petitioner the right to picket with an "unfair" sign, unless the prescribed language appeared on the placard. Judge Rippey, writing for the majority, said:

> "The judgment restraining the use of such a sign was in all respects correct (*Angelos* v. *Mesevich*,

> 289 N. Y. 498). The statement on the sign that the plaintiff was unfair to Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., American Federation of Labor, was false since there was no obligation on the part of plaintiff to enter into a contract with the defendant, as hereafter pointed out."

The judgment as now interpreted by the Court of Appeals still prohibits all dissemination of facts or opinions concerning the dispute by placard, sign, word of mouth or otherwise

> "except that the defendant be permitted to have one man walk in front of plaintiff's store, at 484 Seventh Avenue, in the Borough of Manhattan, City and State of New York, carrying a sign to read as follows:
>
> 'THIS IS NO STRIKE. ALL EMPLOYEES OF DINNY & ROBBINS, INC. ARE REGULAR MEMBERS OF LOCAL 1268, C.I.O., NOT MEMBERS OF LOCAL 1115-F, R.C.I.P.A., A. F. OF L.'"

The judgment prevents the exercise of free speech in any manner and in any place, except picketing as prescribed in front of one store located at 484 Seventh Avenue, Borough of Manhattan, City and State of New York. The Court of Appeals of New York has, for the first time in its history, inaugurated judicial censorship of opinions where its views and notions of right or wrong differed from that of the petitioner. This has been done even though the dissemination of opinions was at all times peaceful and orderly and was not accompanied by any false statements of fact.

The injunction of peaceful activities is based upon the erroneous proposition that peaceful picketing *per se* is

not permissible where no contractual relationship existed between the petitioner and the respondent. Under such circumstances, the majority of the Court of Appeals deems it wrong and unlawful for a group of employees to disseminate its opinion regarding the respondent unless its views on the specific issues or problems involved are first submitted for judicial censorship to the state judiciary.

The dissenting opinion by Judge Desmond pointed out that the majority was disregarding precedent which had already been established by the New York judiciary for many years. He said:

> "Even if we could write section 876-a out of this case, we would still have to deal with our own decisions. Early and late, those decisions positively deny the right to issue an injunction against peaceful picketing by an ambitious union, though the employer has a subsisting contract with another union. (*Interborough R. T. Co.* v. *Lavin*, 247 N. Y. 65; *J. H. & S. Theatres, Inc.* v. *Fay*, 260 N. Y. 315; *Stillwell Theatre, Inc.* v. *Kaplan*, 259 N. Y. 405.) In the *Stillwell* case, which cannot be distinguished from the present case, Chief Judge Pound wrote: 'We would be departing from established precedents if we upheld this injunction.' (p. 412.) The established precedents of that day have since been reinforced by an express statutory prohibition."

He also pointed out that

> "the strength or weakness of a disputant's case * * * his wisdom or folly"

did not depend

> "on the views of any court as to the rights or wrongs of his position."

In pointing out that the majority's decision violated the petitioner's right of free speech, he said:

> "when the court by refusing to allow any wording but its own, denied to the union its right to assert that plaintiff was unfair to it, there was the plainest violation of rules laid down by this court (*Nann* v. *Raimist*, 255 N. Y. 307, 319) and of defendant's right of free speech under the Federal Constitution (*Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, 315 U. S. 769, 774, and cases therein cited)."

Chief Judge Lehman, writing a separate dissenting opinion, recognized the act of the majority as an invasion of the constitutional guarantee of free speech. He said:

> "I concur in the opinion of DESMOND, J. The Constitution of the State of New York, and the Constitution of the United States guarantee freedom of speech and those guarantees are violated by censorship though exercised by a court with conscientious intent that no representations which in the opinion of the court distort the truth, and no arguments which, in the opinion of the court, are specious, should induce the public to appraise the merits of a dispute in manner which ignores the economic axioms of the orthodox and the social philosophy of the respectable."

II. Jurisdiction of This Court

The Judgment Here in Question Is a Final Judgment Rendered After Trial of the Action, Absolutely and Permanently Enjoining the Peaceful and Orderly Labor Activities of the Petitioner Union.

The judgment has been affirmed by the Court of Appeals of the State of New York, the highest Court of that State in which a decision could be had.

The petitioner union and the individual petitioners urged upon the New York Courts their contention that the said final judgment violated their privileges and immunities under the Federal Constitution, in that they were restrained from the exercise of their rights of freedom of speech and assembly. This constitutional question was urged upon the Trial Court (94), as well as the Appellate Division. The Court of Appeals, in its opinion, recognized that this was the main and substantial issue presented upon the appeal. The amended remittitur, dated April 15, 1943, states:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The respondent contended that the judgment of the Trial Court, which granted the injunctive relief against the respondent, violated the constitutional rights of the respondent under the Fourteenth Amendment of the Constitution of the United States. This Court held that said judgment did not violate the constitutional rights of the respondent under the Fourteenth Amendment of the Constitution of the United States." (p. 97)

A substantial federal question was thus presented and this Court clearly has jurisdiction to issue a writ of certiorari to the Court of Appeals of the State of New York, pursuant to Section 237-b of the Judicial Code of the United States (28 U. S. C.; Section 344-b).

III. Questions Presented

Stated in Concise Form, the Questions Here Presented Are as Follows:

1. May a State Court enjoin peaceful and orderly picketing by a legitimate labor organization, merely be-

cause that picketing is not directed against an employer of members of the union?

2. Assuming that the previous question must be answered in the negative, should an exception to the rule be established, where a State Court censors a placard which expresses an opinion and the Court prescribes the specific language to be carried on a placard in conformance with its particular notion of right or wrong regarding the merits or weaknesses of the disputants' case.

In the discussion of the reasons for the allowance of the writ sought by the petitioner, immediately following, we shall consider in detail the foregoing questions.

IV. Reasons for Allowance of Writ

The absolute injunction issued by the New York State Supreme Court against the petitioners violates the guarantee of freedom of speech and assembly provided in the Federal Constitution.

> Constitution of the United States, Amendment XIV, Section 1.

The dissemination of information or opinion concerning the facts of an industrial dispute has definitely been held to be within the area of free discussion which is guaranteed by the Constitution, whether the mode of dissemination employed involves the use of the spoken word or the carrying of banners or placards in the course of activities known as picketing. This Court has reiterated this rule many times, regardless of whether the union picketing, picketed an employer of nonunion labor or an employer of members of another union.

> *United States* v. *Hutcheson,* 312 U. S. 219, 61 S. Ct. 463;

United States v. *Building and Construction Trades Council of New Orleans, Louisiana,* 61 S. Ct. 839;
United States v. *The United Brotherhood of Carpenters and Joiners of America,* 61 S. Ct. 839;
Journeymen Tailors Union Local #195 v. *Miller's, Inc.,* 61 S. Ct. 732;
Senn v. *Tile Layers Union,* 301 U. S. 468;
Thornhill v. *Alabama,* 310 U. S. 88;
Carlson v. *California,* 310 U. S. 106;
A. F. of L. v. *Swing,* 312 U. S. 321;
Bakery and Pastry Drivers Union v. *Wohl,* 315 U. S. 769;
Schneider v. *State,* 308 U. S. 147.

Whether or not the present controversy, as a matter of New York State law, ought properly to be designated as a statutory labor dispute within the meaning of Section 876-a of the Civil Practice Act of New York is not material here, and we are not concerned with the decision reached by the State Courts in that respect, for the decision of that question does not affect the existence of the federal question here at issue.

It has been held by this Court that one need not be involved in a "labor dispute" as defined by State Law to have a right under the Fourteenth Amendment to express a grievance or to disseminate information or opinions in a labor matter.

Bakery and Pastry Drivers Union v. *Wohl,* 315 U. S. 769.

The picketing herein questioned consisted of nothing more than the dissemination of an opinion which the

Union deemed relevant to its own interests and such expression of opinion was entitled to the protection of the constitutional guarantee. This Court has recently stated in unequivocal language that the mere absence of an employment relation between the parties furnishes no authority for the issuance of an injunction by a state court forbidding peaceful persuasion and peaceful picketing.

A. F. of L. v. *Swing,* 312 U. S. 321.

This Court has also frowned upon the censorship of comments because the pervasive threat inherent in the existence of such a right of censorship constitutes grave danger to freedom of discussion.

Thornhill v. *Alabama,* 310 U. S. 88.

In a very recent decision, this Court denied the right of administrative censorship where the right of free speech was involved.

Largent v. *State of Texas* (559—October Term, 1942).

The injunction granted by the Supreme Court of the State of New York, in the case at bar was in direct violation of the principles clearly stated by this Court in the above mentioned cases.

National Importance of the Issues in Question

For the past forty years, the State of New York has permitted picketing by a Union whose activities were directed against an employer employing members of another union. Until very recently, an unbroken line of

decisions sustained this right. Several years ago, when a case identical to the case at bar was presented at the New York Court of Appeals, it reversed an injunction order which directed the insertion of additional language in a placard similar to the case at bar (see *Edjomac* v. *Empire,* 273 N. Y. 647). The right to exercise peaceful persuasion was unhampered and any attempt at censorship of placards which truthfully stated facts or expressed an opinion was never permitted.

The interests of industry and of labor cut across state lines and the decisions in one state affect labor relations in another. In fact, most states have aped and followed New York State in its previous liberal and advanced thinking regarding the fundamental rights of working men. The prior decisions of the New York State Court of Appeals which permitted peaceful picketing against an employer of members of another union have been followed by almost all other states in the Union. Now, for the first time, the New York State Court of Appeals has attempted to set itself up as censor of opinions which do not coincide with its particular conception of right or wrong or of wisdom. For the first time in the history of labor relations in the State of New York, the Court of Appeals has enunciated a new principle which, if permitted to stand, must necessarily endanger all right of peaceful discussion by members of labor unions. If the right to censor the placard in the case at bar is sustained, this right once established may vary in degree in each case which may hereafter come before the state judiciary, to the point where a person's privilege to write or speak upon any labor issue will be permissible only where the righteousness of his opinion is first approved by the State Court. Even then, the right to speak will be permitted

only if lengthy and burdensome additional verbiage prescribed by the court is added. Thus, the right to speak can be nullified by weighing down any simple statement with unlimited verbiage, so as to make the exercise of free speech difficult, costly and burdensome. Under such circumstances it would be more difficult to make effective use of free discussion than paying a tax for the right to speak. If this right of censorship exists on the part of the state judiciary, then the same right may be exercised by the State Legislature, as well as the governing bodies of municipalities and towns. Thus, the cherished right granted to us by the founders of this nation can be taken away by any majority in power to the point where a minority can be utterly and completely deprived of the right of free speech or assembly. No longer will it be possible for fair rules of conflict to exist between the strong and the weak and those in power will have the right to prohibit the dissemination of information or opinions which they deem irrelevant or unwise to the issues involved. The cherished right of freedom of speech can not be threatened by any graver and more serious evil than that of permitting judicial censorship under the facts of this case. To permit the judgment to stand in its present form in the State of New York, will result in an importation into all other states of a doctrine which heretofore has never been permitted by this Court.

WHEREFORE your petitioners and each of them respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, demanding that Court to certify and send to this Court for review and determination on a day certain to be therein named

a full and complete transcript of the record and all proceedings in the case entitled on its docket

DINNY & ROBBINS, INC.

against

ALFRED S. DAVIS, as Treasurer of Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, *et al.,*

and that the order and judgment of said Court of Appeals may be reversed, and that your petitioners may have such other and further relief as may be just and proper.

ALFRED S. DAVIS, as Treasurer of Retail Shoe Salesmen's Union, Local 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, "JOHN DOE" and "RICHARD ROE", members of Retail Shoe Salesmen's Union, Local 1115-F, etc.,

By SIMON J. LIEBOWITZ,
Attorney for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ALFRED S. DAVIS, as Treasurer of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "JOHN DOE" and "RICHARD ROE", members of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown,

Petitioners,

against

DINNY & ROBBINS, INC.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions of Courts Below:

The Supreme Court of the State of New York made findings of fact and conclusions of law (R. 18-27), and did not render an opinion. The majority of the Appellate Division of the Supreme Court of the State of New York, First Department made findings of fact and conclusions of law (R. 80-83). The majority wrote an opinion (264 App. Div. 375; R. 85). The Court of Appeals of the State of New York wrote an opinion (290 N. Y. ; R. 89-95).

II. Jurisdiction:

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of the State of New York is Section 237-b of the Judicial Code of the United States (Title 28, U. S. C.; Section 344-b).

Date of Entry of Judgment to Be Reviewed:

The judgment of the Court of Appeals of the State of New York here sought to be reviewed was entered on March 29, 1943. The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (Title 28, U. S. C.; Section 350).

III. Statement of the Case:

A summary of the facts has already been made in the preceding petition for a writ of certiorari, pages 2-10, which, in the interests of brevity, is hereby adopted and made a part of this brief.

IV. Specification of Errors to Be Urged:

The Court of Appeals of the State of New York erred in holding that an absolute injunction against peaceful and orderly picketing could properly issue because no employment relationship existed between the members of the petitioner union and the respondent unless pickets carried signs which were censored and set forth the specific language prescribed by the Court. In addition, the injunction prohibits all exercise of freedom of speech by word of mouth, sign or otherwise and permits a very

limited right of picketing by placard only in front of one specifically named store, thus preventing the exercise of even a censored right of free speech by word of mouth or otherwise, in any other place or part of the community. Such holding necessarily violated the constitutional guarantee of freedom of speech and assembly for there was no local question involved which furnished a basis for deciding the case without reference to the federal question. If in any respect the activities in question exceeded the bounds of the area of freedom of speech, and assembly guaranteed by the Constitution, the State Court should have separated the illicit conduct from the licit, and enjoined the former while protecting the latter. There was no justification, however, for the issuance of an indiscriminate blanket injunction. This is the fundamental error here urged.

V. Summary of Argument:

(A) The Injunction Issued by the State Court Violated the Constitutional Guarantee of Freedom of Speech and Assembly.

1. The activities in question consisted solely of peaceful and orderly dissemination of opinion of the petitioner union.

2. Restraint of such activity by judicial decree as well as by statute is forbidden by the decisions of this Court.

(B) There Was No Local Question Involved Which Furnished the Basis for Deciding This Case Without Reference to the Federal Question.

VI. Argument:

(A) The Injunction Issued by the State Court Violated the Constitutional Guarantee of Freedom of Speech and Assembly.

1. The activities in question consisted solely of peaceful and orderly dissemination of opinion of the petitioner union.

There is no dispute whatever with respect to the peaceful and orderly character of the picketing conducted by one person, a member of the petitioner union. As has been noted in the statement of facts set forth in the petition for certiorari hereto annexed, the Trial Court specifically found:

> "The man walking up and down and bearing the aforementioned sign was not creating any disturbance." (55)
> "The man aforementioned used no violence in the course of his picketing." (56)
> "The man aforementioned was not disorderly in the course of his picketing which was peaceful at all times." (56)
> "The man aforementioned, while picketing, made no verbal statements concerning the picketing." (56)
> "The defendants have not called any strike against the plaintiff and have not stated that any of the plaintiff's employees were on strike." (57)

The Union, on December 2, 1941, sent to the respondent a letter, enclosing a copy of the contract requesting that the respondent communicate with the Union. The respondent failed to communicate with the Union and three weeks thereafter the Union commenced to picket peacefully, with a sign which stated that the respondent was

unfair to this said Union (58-60). The Trial Court further found

> "The defendant acted as it did for the purpose of benefiting its members and itself." (60)

Thus, it is clearly established that the picketing was conducted by one person in front of one store out of three, and that the picketing was at all times peaceful and orderly. Furthermore, no verbal statements of any kind were made or uttered and the only statement addressed to the public was the language set forth on the placard which expressed an opinion by the Union that the respondent was unfair to it.

The Trial Court found that such picketing

> "was misleading as it created the impression that the plaintiffs were unfair to labor." (55)

The Trial Court further found that such picketing

> "was misleading to the general public and the customers of the plaintiff in that they were led to believe that the employees of plaintiff were on strike, and that the plaintiff was unfair to organized labor." (74)

These findings were made despite the fact that no member of the public or customer of respondent testified to that effect. This was merely an opinion of the Trial Court and the inference it drew from the exercise of the right of peaceful picketing with a sign bannering an employer as "unfair". The Appellate Division adopted the findings of the Trial Court with the exception of the findings that the picketing was misleading to the general public and that the customers of the plaintiff were led to believe that the employees of the respondent were on strike. Nor were the findings of the Trial Court altered

by the Court of Appeals except to reinstate the findings regarding the misleading impression which members of the public gained from such activities. It is also important to note that the respondent was unable to prove that any damage resulted to its business because of such peaceful persuasion. There is no conflict of evidence regarding the activities of the petitioner. The only issue appears to be that (1) carrying a placard with the word "unfair" is a wrong and unlawful act; and that (2) no picketing of any kind is permissible, where an employer employs members of another Union, unless the placard contains censored language as prescribed by the State Court.

In view of these facts, the issues presented to the State Courts were necessarily limited. There were two basic questions:

a. Whether the conduct and activities prescribed herein were an exercise of the constitutional right of free speech.

b. Whether a statutory labor dispute existed.

If a "labor dispute" were found to exist, it would require the dismissal of the complaint for failure to comply with the provisions of the statute. It is apparent that the decision of the second question relating to the existence or non-existence of a labor dispute could not finally determine the case because the State Court still had to pass upon the fundamental constitutional question.

2. The Constitutional Guarantee Here Invoked:

The injunction issued by the New York State Supreme Court was in direct contravention to the Constitution of the United States in that thereby the State of New York

was enforcing a judgment and law which abridged the privileges and immunities of the petitioners as citizens of the United States, and in that thereby the petitioners were deprived of liberty without due process of law.

3. The Decision of the New York State Court of Appeals Is Inconsistent with the Decisions of This Court:

As shown by the statement of facts set forth in the petition for certiorari, which we have incorporated in this brief by reference, the petitioner union was engaged in peaceful and orderly picketing by means of one picketeer in front of one store owned by the respondent. No false statements of fact were made or uttered. No violence or mass picketing was indulged in. The only activity was in having one picket walk back and forth in front of a store carrying a placard which stated that the respondent was unfair to the petitioner. No verbal statements of any kind were uttered. Because it appears that the respondent was under contractual relationship with another union, it is contended that the petitioners' right to exercise free speech may be limited and prohibited absolutely because no direct employer and employee relationship exists between the petitioner and the employees of the respondent. This Court, in *Journeymen Tailors Union Local 195* v. *Miller's, Inc.*, 61 S. Ct. 732, reversed the judgment of the highest court of the State of New Jersey upon an application for a writ of certiorari where very similar facts existed. There, a union picketed an employer who employed members of another union.

In *United States* v. *Hutcheson*, 61 S. Ct. 463; Chief Justice Stone, in a concurring opinion stated:

> "* * * the publication, unaccompanied by violence, of a notice that the employer is unfair to organized

> labor and requesting the public not to patronize him, is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress. See Thornhill *v.* Alabama, 310 U. S. 88."

In *A. F. of L.* v. *Swing,* 312 U. S. 321, this Court said:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. *The interdependence of economic interest of all engaged in the same industry has become a common-place."*

The petitioner union, the C.I.O. union under contractual relationship with the employer and the respondent herein are all engaged in the same industry.

Mr. Justice Murphy, in *Thornhill* v. *Alabama,* recognized the danger of censorship, when he said:

> "The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near *v.* Minnesota, 283 U. S. 697, 713."

The Court of Appeals of New York has set itself up as a judicial censor of proper objectives of a labor union and is substituting its particular notion of right or wrong in determining whether the right of free speech in its absolute sense may be exercised by the petitioner union. In an analogous case this Court recently, in *Largent* v. *State of Texas* (559—October Term—1942), rejected an ordinance which permitted a mayor to issue a permit for the distribution of publications if he "deems it proper or advisable". Justice Reed said:

> "Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press, and of speech guaranteed by the Fourteenth Amendment."

In the case at bar the state judiciary has assumed the power to deprive individuals of their constitutional right because it in effect deems their activities improper or unwise. It would be repetitious to quote from the numerous cases this Court has decided within the past two or three years, upholding the right of labor unions to disseminate information or opinions which they deem relevant to their own interests.

Thornhill v. *Alabama,* 310 U. S. 88, 105;
Carlson v. *California,* 310 U. S. 106
Milkwagon Drivers Union v. *Meadowmoor,* 312 U. S. 287;
Bakery and Pastry Drivers Union v. *Wohl,* 315 U. S. 769;
Cantwell v. *Connecticut,* 310 U. S. 296;
Schneider v. *State,* 308 U. S. 147.

The dissenting opinion of Chief Judge Lehman accurately appraises the grave danger of the judgment of the Court of Appeals. He said:

> "I concur in the opinion of Desmond, J. The Constitution of the State of New York, and the Constitution of the United States guarantee freedom of speech and those guarantees are violated by censorship though exercised by a court with conscientious intent that no representations which in the opinion of the Court distort the truth, and no arguments which, in the opinion of the court, are specious, should induce the public to appraise the merits of a dispute in manner which ignores the economic axioms of the orthodox and the social philosophy of the respectable."

The conclusion is inevitable that in restraining the conduct aforesaid the Courts of New York were violating the rights of the petitioners guaranteed by the Constitution of the United States. We believe it to be of the utmost importance that this Court clearly rule that the holding of the *Journeymen Tailors* case and *United States* v. *Hutcheson,* as well as the *Swing* case is applicable to the situation in this case. As has been indicated in the accompanying petition, the question is of national importance because, as will be noticed, the vital interests of industry and of labor cut across state lines and the establishment of judicial censorship of opinions in labor matters in one state definitely affects labor relations in other states. The decisions of labor matters in New York having been followed for many years by most states, it is inevitable that divergent views and adoption of this principle may follow. It is important that divergent views on the part of the various state courts with respect to this federal question be not permitted to arise and exist.

4. The Judgment of the State Court Inaugurates Judicial Censorship of Speech in Labor Controversies:

The analysis of the opinion by the majority of the New York Court of Appeals in this case definitely shows that the determination was based upon its particular conception of right or wrong, and its belief as to how industrial affairs should be conducted in the exercise of free speech. Its decision means that it is no longer permissible for labor unions to engage in activities which have heretofore been recognized as lawful and proper, where the majority of the Court of Appeals does not think that opinions expressed are relevant to the issues. By holding that the petitioner's peaceful activities were "unlawful", it is impossible to extract any uniformly applicable set of economic or legal principles. That Court has enunciated a dangerous doctrine of attaching the label "unlawful", or "retaliatory", where it deems the exercise of free speech or the issues involved unwise or improper. It is clear that the Court of Appeals assumed the power to render an *ad hoc* determination upon the merits of the particular social and economic problem presented and accordingly to restrict freedom of speech.

This decision warns that henceforth labor organizations are not free to pursue peaceful activities until judicial approved has been obtained. By virtue of this decision, the lawfulness or unlawfulness of the exercise of free speech is to be determined *de novo* in each case which comes before the Court. Persons interested in labor disputes will have the privilege of communicating their opinions to others only if the State Court approves the objects sought to be attained and whether or not that object meets judicial approval will be known only when the Court has ruled. That the adoption of such a doc-

trine constitutes absolute and unconfined judicial censorship of speech cannot intelligently be doubted.

Under the policy aforesaid, the Court's supervision of objectives is not necessarily limited to the field of labor controversies. The same logic or illogic would permit the determination by the Court of the legality of all objectives sought to be attained by the free communication of ideas. Thus, it may reasonably be expected to follow, if the decision in the case at bar is held constitutionally sound, that state courts will assume the power to declare generally in what causes banners may be carried, pamphlets distributed and oral statements voiced, and in what causes silence must be maintained or in what causes statements first censored by the judiciary may be uttered. This forecast should not be dismissed as absurd because this is precisely what the Court of Appeals has already done in the field of labor controversies, and before this doctrine has become rooted, there is urgent need to inquire by what authority the field of labor controversy, more or less than any other field of human activity, merits subjection to judicial censorship. The state judiciary has assumed to exercise a power in the case at bar which thus far neither legislative nor even administrative agencies of the State have ever ventured to exercise. The continued exercise of such power is fraught with a danger most grave and most immediate.

B. There Was No Local Question Involved Which Furnishes a Basis for Deciding This Case Without Reference to the Federal Question.

As has been noted, there were but two issues presented to the New York State Courts: (1) whether the peaceful activities of the petitioner union in disseminating facts and opinions concerning an industrial dispute was

subject to injunctive restrains; and (2) whether a statutory labor dispute was involved.

We have already pointed out that the decision of the second question, unless in favor of the petitioner union, could not be determinative of the case, so that the state courts necessarily had to pass upon the first question which was an essentially substantial and important federal question, in order to arrive at a decision in favor of the respondent. Not only does the opinion bear this out but the amended remittitur also states that a question under the Constitution of the United States was presented and necessarily passed upon, and that the petitioner union contended that the injunction of the Trial Court violated the constitutional rights of free speech, belonging to the respondent. The said remittitur also states that the Court of Appeals held that the judgment did not violate the petitioners' constitutional right of free speech.

CONCLUSION

The writ of certiorari requested by the petitioners should be granted, the judgment of the Court of Appeals of the State of New York should be reviewed by this Court, and the said judgment should be reversed.

Respectfully submitted,

SIMON J. LIEBOWITZ,
Attorney for Petitioners.

On the Brief,

SIMON J. LIEBOWITZ
and
LEON REICH.

(23)

Office - Supreme Court, U. S.
FILED
JUN 11 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1942

No. 1042

ALFRED S. DAVIS, as Treasurer of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "JOHN DOE" and "RICHARD ROE", members of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown,

Petitioners,

against

DINNY & ROBBINS, INC.,

Respondent.

RESPONDENT'S BRIEF

SAMUEL J. ROBBINS,
Attorney for Respondent.

On the Brief,
SAMUEL J. ROBBINS
and
SIDNEY O. RAPHAEL.

INDEX

	PAGE
I. Statement of Case	1
II. Summary of Argument	4
(a) The injunction issued by the Supreme Court and affirmed by the Court of Appeals, conformed with all the principles of equity, jurisprudence and was interpreted under a local law of the State of New York	4
(b) There is a local question involved under Sections 703, et seq., of the Labor Law of the State of New York, under which the judgment of the State Court can be amply sustained	4
(c) The injunction issued in favor of the respondent did not violate the constitutional guaranty of "Freedom of Speech and Assembly"	4
III. Argument	4
(a) The injunction issued by the Supreme Court and affirmed by the Court of Appeals, conformed with all the principles of equity, jurisprudence and was interpreted under a local law of the State of New York	4
(b) There is a local question involved under Sections 703, et seq., of the Labor Law of the State of New York, under which the judgment of the State Court can be amply sustained	9
(c) The injunction issued in favor of the respondent did not violate the constitutional guaranty of "Freedom of Speech and Assembly"	10
Conclusion	15

PAGE

A. F. of L. v. Swing, 312 U. S. 321 12

Bakery & Pastry Drivers Union v. Wohl, 315 U. S. 769 .....12, 14

Canepa v. John Doe, 277 N. Y. 52 14
Coward Shoe v. Retail Shoe Salesmen's Union, 177 Misc. 708 8
Coward Shoes v. Same, N. Y. L. J. Nov. 23, 1942 (decision by Mr. Justice Cohalan) 8

Florsheim Shoe Co. v. Retail Shoe Salesmen Union, 288 N. Y. 188 7

Hotel & Restaurant Employees Union v. Wisconsin Employment Relations Board, 315 U. S. 437, 440, 441 13

Kitty Kelly Shoes v. Same, decision unreported 8

London Character Shoe Corp. v. Davis, 31 N. Y. Supp. (2nd) 807 8

Matter of Triboro Coach Corp v. N. Y. State Labor Relations Board, 286 N. Y. 314 7

Neblett v. Carpenter, 305 U. S. 297 9

People v. Bellows, 281 N. Y. 67 14
People v. Jenkins, 255 N. Y. 637 14

Retail Clerks Union Local 1403 et al., v. Wisconsin Employment Relations Board, 242 Wisc. p. 21 .. 13

Senn v. Tile Layers Union, 301 U. S. 468 13

United Baking Co. v. Bakery & Confectioners Union 257 App. Div. 501 7
United Electric Coal Co. v. Rice, 80 Fed. (2d) p. 1, Cert. den. 297 U. S. 714 7

STATUTES CITED.

Civil Practice Act of the State of New York, Section 876-A 5
Labor Law of the State of New York, Article 20, Sections 700-709 6
Norris-LaGuardia Act (29 U. S. C., pp. 101-115) 5
U. S. Constitution, Amendment XIV, Sec. 1 ....4, 10, 12, 14

Supreme Court of the United States

ALFRED S. DAVIS, as Treasurer of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., affiliated with the American Federation of Labor, and "JOHN DOE" and "RICHARD ROE", members of RETAIL SHOE SALESMEN'S UNION, LOCAL 1115-F, R.C.I.P.A., pickets in front of plaintiff's store, true names of said persons being unknown,

Petitioners,

against

DINNY & ROBBINS, INC.,

Respondent.

RESPONDENT'S BRIEF

. Statement of the Case:

The respondent operates three retail shoe stores in permanent locations in the City of New York. As a result of a collective bargaining agreement entered into October 1st, 1941, with the Retail Shoe Salesmen's Union of New York, Local 1268, chartered by the United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organization (C. I. O.), the respondent was legally obligated to maintain a closed shop and all of its employees were required to be members of the latter union. The contract covered in great detail the wages and other working conditions of the respondent's employees. The contract followed at least two earlier contracts with this C. I. O. union, each for a similar period. The contract entered into on October 1st 1941, was by its terms, in full force and effect at the time the picketing was commenced by the petitioner

herein; not terminable until October 1st, 1942, which was the expiration date mentioned in the agreement.

The respondent's complaint before the Supreme Court of the State of New York, alleges the aforementioned facts and further asserts that there is no real labor dispute between the parties herein. That there is no controversy concerning wages, hours or other working conditions, nor had the defendant, prior to the commencement of the picketing ever attempted to organize the respondent's employees. There was no pretense or claim on the part of the petitioner that the picketing of the plaintiff's stores was a bona fide attempt at collective bargaining, with the object of increasing wages or bettering conditions of the plaintiff's employees. On the contrary, it was an undisputed fact and a matter of factual finding by the Court that no strike had been called against the respondent, and further that the respondent in good faith, had entered into and was operating under the binding collective bargaining agreement with the C. I. O. union, referred to hereinabove.

The attempt at laying a basis in aid of justifying the picketing by the petitioner by resorting to the ruse of sending a letter to the respondent containing the simple demand on the part of the petitioner that the plaintiff abrogate its contract with the C. I. O. union and enter into a contract it proposed was a mere subterfuge. This latter statement is amply borne out by the findings made in the Appellate Division, known as "Findings 9 and 11" which we quote as follows:

> "*Finding No. 9:* The defendants have not called any strike against the plaintiff and have not stated, except by implication that any of the plaintiff's employees were on strike."
>
> "*Finding No. 11:* That the C. I. O. unions were picketing stores employing members of the defendant union and subsequently the picketing herein commenced."

It is clearly evident that the picketing was purely and simply retaliatory; an extramural dispute between two rival unions springing from a motive other than that on part of the petitioner to effect a betterment of labor conditions or working standards of employees engaged in a retail shoe industry.

The picketing was carried on by persons bearing placards containing a legend which read as follows:

"Dinny & Robbins Shoes

are

Unfair to

Retail Shoe Salesmen's Union, Local 1115-F,
R.C.I.P.A., American Federation of Labor."

It is apparent from even a cursory examination of the style employed in the composition of the within legend that emphasis was layed upon the prefatory words "Dinny & Robbins Shoes are unfair to * * *." What the pickets were accentuating by the placards were the facts in bold letters standing out at the top of the placard was that the respondent's shoes were unfair to the petitioner. The trouble with the style employed in this legend is that too much emphasis was placed upon the prefatory words indicating the unfairness of the respondent and too little stress was placed upon the balance of the legend which would indicate that the unfairness was only to the petitioner herein. Furthermore the Supreme Court of the State of New York, took the position that this latter fact coupled with the additional fact that there was a tendency on the part of this legend to be misleading, inasmuch as this term "unfair" might be construed as connoting a general unfairness, and a lack of sympathy on the part of the respondent, would permit picketing to continue only if the petitioner would

include in the legend a statement which would truthfully set forth the respective positions of the petitioner and the respondent and give eminent and fair publicity to the true issue.

II. Summary of Argument:

(a) The injunction issued by the Supreme Court and affirmed by the Court of Appeals, conformed with all the principles of equity, jurisprudence and was interpreted under a local law of the State of New York.

(b) There is a local question involved under Sections 703, *et seq.*, of the Labor Law of the State of New York, under which the judgment of the State Court can be amply sustained.

(c) The injunction issued in favor of the respondent did not violate the constitutional guaranty of "Freedom of Speech and Assembly".

III. Argument:

(A) The injunction issued by the Supreme Court and affirmed by the Court of Appeals, conformed with all the principles of equity, jurisprudence and was interpreted under a local law of the State of New York.

One has but to look to the proposed findings submitted by the petitioner herein on the settlement of the decree in the Trial Court to readily ascertain the fact that even the petitioner conceded the fact that this respondent had contractual relationship with the C. I. O. union, in this very same retail shoe field for a period of three and a half years prior to the entry upon the scene by the petitioner. Furthermore, the petitioner in another proposed finding, No. 10, submitted by it, agreed that it had not called any strike against the respondent's employees,

nor were any of the respondent's employees on strike at the time. It is further evident from the findings made by the Appellate Division, that this picketing commenced by the petitioner was in furtherance of a pseudo strike to retaliate and counteract picketing which had been leveled by the C. I. O. union against this petitioner prior thereto. By resorting to this latter form of pressure, this petitioner had hoped to alleviate a problem which had been pressing it and the employers with whom it supposedly had collective bargaining agreements. It is noteworthy that this respondent is in no way connected with this extramural controversy. The evidence purely and simply demonstrates that this respondent is wedged between two irreconcilable organizations in a controversy which does not concern this respondent in the slightest degree.

The Court further found as a fact and this was reaffirmed by the Court of Appeals that the letter written by the petitioner demanding the entry into a collective bargaining contract with it under the peril of risking a strike was nothing more than a mere subterfuge. It was attempting to create a pretext for what ensued thereafter. Two legal issues were demonstrated at the trial of the respondent's injunction case. They were namely: Whether the issue presented was a labor dispute within the meaning of Section 876A of the Civil Practice Act, and whether or not the Court possessed the power to prevent the interference with a valid and legally subsisting collective bargaining agreement under the terms of which this respondent was already bound.

Section 876A of the Civil Practice Act is patterned along the lines of the Norris-LaGuardia Act (29 U. S. C., pp. 101-115). In substance it immunizes labor disputes against restraint by picketing. Injunctions can no longer be granted which would insulate the employer against picketing by a bona fide labor union, acting in behalf of

the employees in betterment of their working conditions and standards.

The Court concluded after a trial of the issues that there was no genuine labor dispute. It was self-evident after an examination of all the salient facts that the defendant's efforts were a mere subterfuge, in aid of its retaliatory counterattack against the C. I. O. with which this employer had a bona fide collective bargaining agreement. As hereinabove stated this petitioner by its own proposed findings submitted to the trial court, admitted the existence of this collective bargaining agreement and that there was no strike declared against the respondent, nor were the respondent's employees on strike. In this way was the preliminary objective handled, and the Findings of Fact and Conclusions of Law made that there was no labor dispute under Section 876A of the Civil Practice Act and that therefore the Court possessed common law, chancery, jurisdiction to proceed with the granting of an injunction after it was satisfied from a preponderance of the evidence as submitted by this respondent that it was entitled to equitable relief.

To determine the latter issue, the Court was guided and influenced by Article 20 of the Labor Law of the State of New York, specifically Sections 700 through 709 of the Labor Law.

The respondent by virtue of its collective bargaining agreement then in force with the C. I. O. union and not expiring until October 1st, 1942, could not run the gamut of entering into a collective bargaining agreement with this petitioner by disaffirming such existing contract between themselves and the C. I. O. union. In doing so it would be guilty of an unfair labor practice and subject to the punitive provisions of the State Labor Relations Act. Inasmuch as the contract which was executed between this respondent and the C. I. O. union encompassed

a closed shop, and represented the will of 100% of the respondent's employees, and the C. I. O. union was the duly accredited bargaining agent for these employees, this respondent was precluded from and prohibited by the New York State Labor Relations Act from recognizing any other collective bargaining agent during the term of the existing agreement, unless ordered to do so sooner by the affirmative action of the New York State Labor Relations Act.

See: *Matter of Triboro Coach Corp.* v. *N. Y. State Labor Relations Board,* 286 N. Y., page 314;
Florsheim Shoe Co. v. *Retail Shoe Salesmen Union,* 288 N. Y., page 188.

This is the only conclusion which is possible to harmonize with the projected public policy of the State as declared in its Labor Relations Act, so as to put to an end, once and for all, confusing, jurisdictional and retaliatory strikes and other forms of industrial unrest, and instead encourage industrial peace among employers and employees.

See: *United Baking Co.* v. *Bakery & Confectioners Union,* 257 App. Div. 501.

As a matter of fact this Court denied certiorari in a case in which the circumstances were not as compelling as those in the case at bar and in effect, upheld an injunction granted against picketing by a rival union to supersede a validly existing and genuine bona fide bargaining agreement, entered into theretofore by an employer.

See: *United Electric Coal Co.* v. *Rice,* 80 Fed. (2nd), page 1. Cert. den. 297 U. S. 714.

This latter decision was made even prior to the time the Wagner Act effectively set at rest disputes concern-

ing legal and proper certification of bargaining representatives for employees. The Court invoked its general chancery jurisdiction to issue and sustain in behalf of this Coal Company, an injunction banning picketing, arising out of a dispute between two unions.

In the trial of this action, the Court had before it the further evidence substantiating the practices of this petitioner with respect to other employers in the retail shoe industry in the City of New York, where resort had been had to this very same form of picketing in aid of its retaliatory campaign against the C. I. O.

See: *London Character Shoe Corp.* v. *Davis,* 31 N. Y. Supp. (2nd) 807;
Coward Shoe v. *Retail Shoe Salesmen's Union,* 177 Misc. 708;
Coward Shoes v. *Same,* N. Y. L. J., Nov. 23, 1942 (decision by Mr. Justice Cohalan);
Kitty Kelly Shoe v. *Same,* decision unreported.

With this panorama as a background and with the instant facts in the case at bar as a foreground, the Court proceeded to exercise its equitable powers and issue its decree forbidding the picketing resorted to herein. While this respondent contends that the Court could have generally barred all forms of picketing, it nevertheless permitted a continuance of picketing, provided that the same would not be false or misleading and that the legend would not be in the form as that contained in the placard, namely:

"Dinny & Robbins Shoes

are

Unfair to

Retail Shoe Salesmen's Union, Local 1115-F, R. C. I. P. A., American Federation of Labor"

but instead in the following form:

> "This is no strike. All employees of Dinny & Robbins, Inc. are regular members of local 1268, C. I. O., not members of Local 1115-F, R. C. I. P. A., A. F. of L."

It was further provided that the latter quotation be all in the same type and at least be all of the same dimensions

Summarizing, the Court granted equitable relief to restrain an interference with the collective bargaining agreement by the dissemination of statements which were untrue or misleading. In a nutshell, the petitioner was required to truthfully present its case to the public.

(B) There is a local question involved under Sections 703, *et seq.*, of the Labor Law of the State of New York, under which the judgment of the State Court can be amply sustained.

It is academic that this Court will not review a State Court decision, construing or interpreting a statute of its own State.

Neblett v. *Carpenter,* 305 U. S. 297.

It is apparent from the foregoing that in arriving at the result it did, the Court construed the meaning and effect of the New York State Labor Relations Act, *supra.* In doing so, it held that the petitioner's conduct herein did in fact incite or provoke an actual or threatened interference with a genuine collective bargaining agreement between this respondent and the C. I. O. union then in effect. If fostered and encouraged, it would result in the involvement of this respondent in the commission of an unfair labor practice, in direct violation of the State Labor Relations Act. To prevent an unlawful interference with this contractual relationship, the Court con-

strued the State Labor Relations Act, as prohibiting the impairment of an existing collective bargaining agreement and a disavowal of unions' rights under such an agreement to continue as a collective bargaining agent unless the State Labor Relations Board, having jurisdiction under the aforesaid act, directs otherwise after due and lawful hearing, in which all the parties concerned would be heard and due process afforded. The Court having found factual substantiation in the evidence for its conclusions that this petitioner was not rebelling against the labor standards prevailing in this respondent's stores, nor that this petitioner was representing the interests of the respondent's employees for an elevation of their labor conditions, the Trial Court rightfully exercised its general equitable power, fortified by the provisions of the New York State Labor Relations Act and granted the decree it did.

Under the circumstances the respondent urges that the decree having been properly founded upon local law, as well as local statute, certiorari should be denied.

(C) The injunction issued in favor of the respondent did not violate the constitutional guaranty of "Freedom of Speech and Assembly".

The New York State Legislature has provided in the State Labor Relations Act, *supra*, a due and orderly process for settling labor disputes such as this petitioner pretends to have with the C. I. O. union. The petitioner was well aware of the facts, particularly the respondent's responsibility under the terms of its collective bargaining agreement. It had never exhausted the remedies available in those channels afforded by the State Labor Relations Act. On the contrary the petitioner sought to handle this situation in its own way. It now contends that its right of free speech, has been abrogated.

In examining the petition in support of the within writ, one finds many mis-statements and exaggerations as to the contents of the record in the Trial Court, as well as in the Appellate Court.

For instance, on page 4 of the petitioner's record, the following statement appears:

> "A broad and absolute permanent injunction was granted, the contents of which are more fully discussed in a subsequent paragraph."

This is definitely a very incorrect statement, because had the Court granted a broad and absolute permanent injunction, this petitioner would not have been accorded the right to continue picketing, provided the placard bore a truthful legend.

Then at the end of page 5 and the beginning of page 6 of the same record, the petitioner again makes the following statements, apparently to influence this Court:

> "Thus, it is apparent that the trial court granted a permanent injunction which was broad and absolute and restrained the Union for all times from exercising peaceful 'persuasion', against the customers of respondent or any other persons having business relationship or intending or desiring to have business relationships with the respondent. The injunction prohibited all 'persuasion' of any kind, in any form, whether it be by placard, picketing, word of mouth, advertisements, hand bills, etc. except that only one of respondent's three stores could be picketed, and such picket must carry a sign which must read as follows:
>
> > "This is no strike. All employees of Dinny & Robbins, Inc. are regular members of Local 1268 C. I. O., not members of Local 1115-F, R. C. I. P. A., A. F. of L."

Nowhere in the injunction was there any prohibition against the distribution of hand bills, or the publishing

of advertisements which would truthfully set forth the grievance, if any, on the part of this petitioner, nor was there any odium in this petitioner trying to reach some of the employees of the respondent by truthful, honest and respectable means. The Court simply enjoined picketing in front of the respondent's premises by tokens which were untrue and misleading. The attempts by this petitioner to spell out from the terms of the decree prohibitions which are not found there, and then in turn claim that they were violative of the provisions of the Fourteenth Amendment, are specious.

Many cases are cited by the petitioner in support of its contention that its rights of free speech and assembly have been circumscribed. The respondent does not even pretend to take issue with any of these decisions, for they correctly state the law prevailing with respect to the interpretation of the Fourteenth Amendment. No one can gainsay the fact that honest labor disputes or efforts by unions to legitimately attain either better working conditions or greater membership can be delimited by an injunction decree which would prohibit the rights of either peaceful picketing or free voice, opinions or sentiments, in aid of a legitimate pursuit on the part of such labor organization.

See: *A. F. of L.* v. *Swing,* 312 U. S. 321;
Bakery & Pastry Drivers Union v. *Wohl,* 315 U. S. 769.

In the last cited case, the Court painstakingly pointed out that in that case the Trial Court had found that the placards used in the picketing were truthful and accurate in all respects and was done in a peaceful and orderly manner. Apparently great emphasis was laid on this particular part of the findings of the lower Court. In the instant case however, the Court did find as an affirmative fact that this petitioner did use untruthful legends

in its placards while picketing and that the statement on the sign that the respondent was unfair to the petitioner was false inasmuch as there was no obligation on the part of the respondent to enter into contractual relationship with this petitioner because of the statutory barriers imposed by the implicit language of the State Labor Relations Act. The use of the word "unfair" in the legend and the manner in which it was accentuated on the placard lends emphasis to the Court's findings that this petitioner attempted to practice a deceptive type of picketing at the respondent's premises. The manner in which the legend was styled gave emphasis to the correlation between the respondent's name and the word "unfair". In the mind of the average passerby and the public generally, this would only connote one meaning, namely that this respondent was unfair in its dealing with labor. To adjust and correct such possible misconception, the Trial Court ordered uniform lettering on the legend and a terse statement of the true facts forming the basis of the petitioner's alleged grievance.

No one can question the rights of the State Court to interpret and construe the meaning of the State Labor Relations Act, so as to prevent the commission of unfair labor practices.

> See: *Hotel & Restaurant Employees Union* v. *Wisconsin Employment Relations Board,* 315 U. S. 437, 440, 441.

In the case of *Senn* v. *Tile Layers Union,* 301 U. S. 468, Justice Brandeis in justifying peaceful picketing observed that,

> "The publicity did not involve misrepresentation of fact, nor was any claim made below that relevant facts were suppressed."
>
> See also: *Retail Clerks Union Local 1403 et al.* v. *Wisconsin Employment Relations Board,* 242 Wisc., page 21.

One should not assume that Courts of equity have divested themselves of all power to enjoin some forms of excess of so called free speech. Improper and pretended uses of the broad coverage of the Fourteenth Amendment should not be so insulated as to restrain justifiable curbs, when it has been found that there have been actual or threatened abuses of these constitutional privileges. Especially is that so where attempts were made either to resort to violence, practices of fraud, or unjustly victimizing one by a spuriously founded labor dispute, such as in the instant case. The Courts of the State of New York, have long since recognized this principle and have recognized the danger of picketing via misleading and fraudulent legends. Appropriate relief in the form of both civil and penal remedies have been afforded.

People v. *Jenkins*, 255 N. Y. 637;
People v. *Bellows*, 281 N. Y. 67;
Canepa v. *John Doe*, 277 N. Y. 52.

In contradistinction to the situation that prevailed in the case of *Bakery and Pastry Drivers Union* v. *Wohl*, *supra*, the petitioner here affirmatively resorted to fraud and deception which was found as a fact and a conclusion of law by the Trial Court. We respectfully submit that this finding and conclusion founded as it is upon substantial evidence should not be disturbed. The Court did not deprive this petitioner of its rights of free speech, but merely curtailed the excesses that had been indulged in by it in unfairly disseminating its pretended dispute in the circumstances. We do not suppose that the petitioner contends that its deceptive processes are enshrined in the sanctity of constitutional guarantees. Can it be justifiably heard to complain that it must now disseminate propaganda or literature that is in substance untruthful? Certainly it cannot be contended that

this is a legitimate grievance which this or any other Court should be called upon to remedy. In applying the rule of *"Sie utere tuo ut alienum non laedas"* the State Court safeguarded the property rights of the plaintiff against unlawful and unwarranted incursions by the defendant. Thus were the defendant's rights and privileges properly recognized; curbed only by considerations of plaintiff's rights and curtailment of excesses indulged in by the defendant. Both legally, factually and morally the injunction decree granted by the Trial Court was fair and proper.

CONCLUSION

The writ of certiorari requested by the petitioner should be denied.

Respectfully submitted,

SAMUEL J. ROBBINS,
Attorney for Respondent.

On the Brief,
SAMUEL J. ROBBINS
and
SIDNEY O. RAPHAEL.